FOR ARGUMENT

No. 87-168

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

RUSSELL FRISBY, et al.,

Appellants,

v.

SANDRA C. SCHULTZ, et al.,

Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS AND AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN IN SUPPORT OF APPELLEES

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INTEREST OF AMICI

Amici curiae are the American Civil Liberties Union (ACLU), the American Civil Liberties Union of Illinois and the American Civil Liberties Union of Wisconsin.[1] ACLU is a nationwide, non-partisan organization of over 250,000 members dedicated to the defense of the principles embodied in the Bill of Rights. The American Civil Liberties Union of Illinois and the American Civil Liberties Union of Wisconsin are state affiliates of the national organization. The American Civil Liberties Union of Wisconsin participated before the trial and appellate courts as amicus.

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1 A joint letter of consent to the filing of all amicus briefs has been lodged with the Court.

Amici have a special interest in the free speech values protected by the First Amendment to the Constitution. This case presents a direct assault on one of the most fundamental modes of expression in a traditional public forum. The ordinance at issue absolutely bars all peaceful, orderly picketing "before or about the residence or dwelling of any individual in the Town of Brookfield." Town of Brookfield General Code. § 9.17(2). Because amici believe that orderly picketing on the public streets and sidewalks is protected by the First Amendment, we submit this brief in support of the judgment of the United States Court of Appeals for the Seventh Circuit which affirmed the trial court's issuance of a preliminary injunction.

STATEMENT OF THE CASE

The issue in this appeal is whether the trial court was correct when it held that an absolute ban on residential picketing was likely to be held unconstitutional after a trial on the merits.[2]

The record at the preliminary injunction hearing showed that appellees engaged in peaceful, public issue picketing. The question of abortion is a

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2 Appellants contend that this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1254(2)(1988). (Br. of Appellants at 16-21.) They argue that this case satisfies the requirement, under Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986), that the judgment appealed from be final. The finality requirement is not met here because the district court entered only a preliminary injunction. The town appealed, and the Seventh Circuit affirmed that preliminary injunction without opinion. F.2d 822 643. There is no section 1254(2) jurisdiction when, as here, the merits remain in the district court for further proceedings. See Thornburgh, 476 U.S. at ___, 106 S.Ct. at 2176.

highly political one, with well-defined arguments and high emotions on each side. It is one of the most hotly debated public issues of our day. Activists and concerned citizens on each side of the issue can be seen in every community across the country, engaged in speech and expressive conduct aimed at persuading others to join forces in this public debate.

The plaintiffs are citizens who oppose abortion. They organized pickets of the home of a doctor who performs abortions in two nearby communities. The record shows that the pickets generally lasted an hour or two in length, with ten to 15 persons participating. (J.A. 29, 40, 42, 46.)[3]

Dr. Victoria, the subject of the

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3 "J.A." refers to the Joint Appendix filed by the parties.

picketing, lives in a subdivision of Brookfield known as Black Forest. The record shows that Black Forest contains only 14 homes. (J.A. 49.) It has no sidewalks, but the streets are 30 feet wide. There is no evidence in the record that discloses whether any other neighborhood in Brookfield has these characteristics. The town passed the ban in apparent reaction to the picketing at Dr. Victoria's home.

Prior to the passage of the ordinance, Dr. Victoria's home was picketed several times.

No actual evidence of any ongoing congestion or real threat to safety or other valid governmental interest was presented. The evidence suggested that there was an apparent trespass on the Victoria property shortly after one of the pickets. No arrest or prosecution

occurred. (J.A. 69-70.)

It is also suggested that, on one occasion, picketers may have blocked the egress of one of the Victoria family members; however, no law enforcement action was taken. (J.A. 61.) There is no suggestion that Brookfield's disorderly conduct or anti-noise ordinances were violated.

The town contends that the ordinance has two goals: to protect the public safety and to safeguard privacy. At the same time, it concedes that certain protected First Amendment activities are permitted throughout Brookfield, including on the public way before Dr. Victoria's home. This same group of people may march through the neighborhood, singing and chanting. They may go door to door, visiting Dr. Victoria and his neighbors. They may

leaflet throughout the neighborhood. (Br. of Appellants at 41-42.) The only expressive conduct the ordinance prohibits is residential picketing.

This case was heard on a motion for a preliminary injunction. The trial court found that all four factors for preliminary injunctive relief had been satisfied. Schultz v. Frisby, 619 F. Supp. 792, 796 (E.D. Wisc. 1985), aff'd without opinion, 822 F.2d 642 (7th Cir. 1987). Ruling that the prohibition would likely fail as a reasonable time, place and manner restriction because not "narrowly tailored," the court granted the preliminary injunction. The defendants appealed, and the Seventh Circuit affirmed en banc without opinion.[4]

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4 The vacated panel decision is reported at 807 F.2d 1339.

The matter comes to this Court in the posture of a preliminary injunction. The record is a skeletal one, consisting almost solely of affidavits of participants in and witnesses to the picketing. See 619 F. Supp. at 793. The merits are not ready for review because further factual development is needed.

The only issue is whether the district court abused its discretion in issuing the preliminary injunction. Synanon Foundation, Inc. v. California, 444 U.S. 1307 (1979)(per Justice Rehnquist as Circuit Justice); Brown v. Chote, 411 U.S. 452, 457 (1973).[5] If

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5 Appellants argue that plenary review is appropriate because the trial court made errors of law. (Br. at 4.) The trial court identified and applied the appropriate time, place and manner analysis. 619 F. Supp. at 796. A review of appellants' arguments reveals that, contrary to their suggestion, they take issue with the application of law to facts. Thus, the "abuse of discretion" standard is appropriate.

the Court takes certiorari jurisdiction pursuant to 28 U.S.C. § 1254(1)(1988), it should affirm the decision of the Seventh Circuit, and allow the litigation to go forward in the trial court to a final resolution of the case.

SUMMARY OF ARGUMENT

The ordinance is an absolute ban on a traditional form of communication in a traditional public forum. Both the forum and the manner of expression have long been protected by this Court.

The site of this picketing is an important part of the picketers' message. This Court has protected site-specific activities that do not differ in any significant way from the picketing here. E.g. Boos v. Barry, No. 86-803 (March 22, 1988); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Gregory v. City of Chicago, 394 U.S. 111 (1969).

As the trial court properly held, the town cannot justify this restriction as a reasonable time, place and manner regulation, because it is not sufficiently narrowly tailored to serve either of the two interests posited by the town.

The ordinance is not narrowly tailored to effectively serve public safety concerns because it is not aimed directly at the purported effects of picketing, such as traffic congestion and pedestrian safety, of which the town complains. Instead, it simply prohibits all picketing even where traffic congestion and safety are not remotely an issue. The town's concerns can be addressed through enforcement of criminal laws, which are considerably more narrowly tailored to effectively serve its safety interests.

While privacy is advanced as a justification for the prohibition, the town does not define what it means by "residential privacy." Peaceful picketing in a public forum does not invade or threaten any privacy interests that the town can legitimately protect.

The town concedes it may not constitutionally ban marches and demonstrations from residential neighborhoods. Even if these channels were shown to be adequate, the argument that this leaves ample alternative channels is irrelevant, for the existence of other modes of expression cannot save an ordinance that fails to be narrowly crafted.

In addition, the ordinance is vague. The definition of "picketing" supplied by the town, "standing or patrolling", makes the ordinance more, not less,

problematic. It fails to give fair notice of what conduct is prohibited, and leaves too much discretion in the hands of those charged with its enforcement.

Finally, the ordinance is overbroad in that there is no core of constitutionally unprotected expression to which the ban might be limited.

The district court did not abuse its discretion in finding that the ordinance would likely be held unconstitutional after a trial on the merits. The decision of the Seventh Circuit affirming the trial court was correct.

ARGUMENT

I. THE ORDINANCE IS NOT A REASONABLE TIME, PLACE AND MANNER REGULATION.

A. Peaceful, Public-Issue Picketing in a Public Forum is Protected by the First Amendment.

This case concerns an absolute ban on a traditional form of expression in a quintessential public forum. Both the manner of communication and its location have long been afforded the highest protection by this Court.

The public streets and sidewalks have traditionally been viewed as locations where citizens may freely engage in speech and communicative activities.

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the

> streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.

Hague v. C.I.O., 307 U.S. 496, 515 (1939).

The Court has described streets and sidewalks as "'public places' historically associated with the free exercise of expressive activities. . . [They] are considered, without more, to be 'public forums.'" United States v. Grace, 461 U.S. 171, 177 (1983). In Grace, the Court held unconstitutional a ban on leafletting and picketing on the public sidewalks abutting Court grounds, stating that those sidewalks "are indistinguishable from any other sidewalks in Washington, D.C., and we can discern no reason why they should be treated differently." 461 U.S. at 179.

Most recently, in Boos v. Barry, No.

86-803 (March 22, 1988), this Court reiterated that the public streets and sidewalks are traditional public fora, where "the government's ability to restrict expressive activity 'is very limited'." Slip op. at 4, quoting Grace, 461 U.S. at 177.

Public streets and sidewalks are no less public fora because they abut residences or dwellings. In Carey v. Brown, 447 U.S. 455 (1980), this Court held that there could be "no doubt" that a statute "prohibiting peaceful picketing on the public streets and sidewalks in residential neighborhoods" regulated "expressive conduct that falls within the First Amendment's preserve." Id. at 460. See also Gregory v. City of Chicago, 394 U.S. 111, 112 (1969) (peaceful, orderly march through residential neighborhood held "well within the sphere of conduct

protected by the First Amendment.")

It is not by chance that the Brookfield picketers selected the Victoria home, for the site of this picket is an integral part of the expression. The picketers convey their views on abortion not just to Dr. Victoria, but to others as well. Their message is to protest Dr. Victoria's position on the abortion question, and to inform his neighbors that he performs abortions in his medical practice.

This site-specific aspect is often an important part of protected speech. In Carey v. Brown, 447 U.S. at 468 n.13, this Court recognized several types of speech the effectiveness of which depends on the residential setting, citing landlord-tenant, zoning and historic preservation disputes as examples. In Gregory v. City of Chicago, 394 U.S. 111,

marchers walked from City Hall to the mayor's home to protest his stance on school desegregation. (See 394 U.S. at 115-16, Black, J., concurring). The site of the march was critical to the message: a march in some public park or commercial street would not have brought the message "home" to the mayor. In Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), residents protested "blockbusting" activities of a real estate broker by leafletting the broker's neighborhood, to let "his neighbors know what he was doing to us." Id. at 417. Most recently, the Court held unconstitutional a ban on displaying certain signs near foreign embassies. Boos v. Barry, No. 86-803 (March 22, 1988).

Public issue picketing is a form of expression historically protected by this Court from prior restraint. Thornhill v.

Alabama, 310 U.S. 88 (1940). It "has always rested on the highest rung of the hierarchy of First Amendment values." Carey v. Brown, 447 U.S. at 467. Even when accompanied by singing, the stamping of feet, and the clapping of hands, it is an exercise of First and Fourteenth Amendment rights "in their most pristine and classic form." Edwards v. South Carolina, 372 U.S. 229, 235 (1963).

Accordingly, this peaceful, public issue picketing, in a public site selected especially to "bring the message home," is entitled to the highest protection by this Court. Any attempt to prohibit it should be subjected to the most careful scrutiny. Boos v. Barry, slip op. at 4, citing Grace and Carey.

B. The Ordinance is Not Narrowly Tailored to Effectively Serve the Public Safety.

An absolute ban on a particular form of communication, such as Brookfield's ban on residential picketing, is constitutional only if narrowly drawn to accomplish a compelling governmental interest. United States v. Grace, 461 U.S. at 177. Brookfield asserts a public safety justification for its ordinance, but the statute is not precisely drawn to serve it.

In Schneider v. State, 308 U.S. 147 (1939) a ban on handbilling was challenged as an abridgement of free speech. The municipalities banned the mode of expression because, they claimed, it caused litter. But the litter was not the expression itself, only an otherwise-controllable consequence of it. The appropriate course was to enforce

criminal sanctions against littering, not to restrain the speech. 308 U.S. at 162. The ordinances thus were not narrowly tailored.

In Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984), the city banned signs on telephone poles as a means of regulating visual blight. In upholding the ban, the Court stated:

> [I]t is the tangible medium of expressing the message that has the adverse impact on the appearance of the landscape... In contrast to Schneider, therefore, the application of the ordinance in this case responds precisely to the substantive problem which legitimately concerns the City.

466 U.S. at 810.

This case more closely resembles Schneider than it does Vincent, for it is not the expression itself which gives rise to potential safety hazards. Rather, to the extent such hazards exist,

they are the possible consequence of the expression, as was the litter in Schneider. Like the Schneider towns, Brookfield's interests can be fully protected by existing criminal law.

While there is no record evidence to suggest that any pedestrian or auto traffic problem actually occurred during the pickets at Dr. Victoria's home, three ways in which picketers might cause public safety problems are advanced in the town's brief. Picketers are claimed to be in danger from passing cars, especially if they park their buses and cars on the street; other pedestrians are endangered because drivers are distracted by the picketers; and automobile traffic is interfered with. (Br. at 31-32.)

The town concedes that it cannot constitutionally bar marches and leafletting campaigns in residential

areas. (Br. at 41-42.) Yet it has not identified how residential picketers could pose a threat to safety in any way greater than that posed by Gregory marchers or Keefe leafletters. Moreover, picketers do not create a hazard to themselves and others any different from that created by groups of children walking home from school or residents who have organized a neighborhood leaf-raking party.

As the district court noted, a number of ordinances are already in place to control the types of safety problems with which the town professes concern, including prohibitions against obstructing the streets and sidewalks and disorderly conduct. See 619 F. Supp. at 794-95.

In invalidating restrictions on speech, this Court has frequently relied on the availability of criminal sanctions to protect state interests. E.g. Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637, rehearing denied, 445 U.S. 972 (1980) (laws against fraud could protect against dishonest canvassers); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)(state may effectively deal with misleading or deceptive commercial speech without prohibiting advertising). Brookfield has a wide variety of "appropriate public remedies," Kunz v. New York, 340 U.S. 290, 294 (1951), to amply protect its citizens.

In Boos v. Barry, No. 83-803 (March 22, 1988), the Court held that the availability of a criminal statute more

narrowly tailored to the State's concern "amply demonstrate[d]" that the statute in question was "not crafted with sufficient precision to withstand First Amendment scrutiny." Slip op. at 15. At issue was a District of Columbia statute banning the display of signs within 500 feet of a foreign embassy, where the message would bring the foreign government into "disrepute." The Court contrasted that prohibition with a federal statute, applicable outside the District, criminalizing activities that "intimidate, coerce, threaten, or harass" foreign officials. The federal statute was aimed directly at the activity that threatened the government's interest in protecting foreign diplomats. It was "considerably less restrictive" of speech than the District's ban on signs. Slip op. at 12. The Court held that the

District's sign ban was "not narrowly tailored; a less restrictive alternative is readily available." Slip op. at 15.

Each of Brookfield's purported safety concerns may be effectively dealt with by measures "considerably less restrictive," Boos v. Barry, slip op. at 12, than this absolute ban.[6]

Because the ordinance is not precisely drawn to regulate the safety hazards claimed to be caused by residential picketing, the claimed public safety interest cannot justify this ordinance.

C. The Ordinance Does Not Protect Privacy.

The town argues that picketing per

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6 Some restriction on residential picketing could be narrowly drawn to serve effectively the safety interest. For example, the town may regulate to accommodate competing uses of the forum if more than one group desires to picket at the same location.

se is a privacy invasion: picketing is "uniquely invasive" (br. at 42) and "[e]ven one picket is an unacceptable intrusion into the privacy of the person whose home is being picketed" (br. at 37). Significantly, the town does not identify precisely what it means by the term "residential privacy." It identifies no specific way in which picketing intrudes upon a homeowner or causes any sort of invasion which the town may legitimately protect.[7]

Picketers confine themselves to public property. They do not enter onto the private domain in order to exercise their First Amendment rights. This Court

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7 To the extent that the noise may be argued to invade privacy, Brookfield's anti-noise ordinance should be sufficient. A narrowly drawn regulation might provide for a different allowable noise level on the public streets and sidewalks after, for example, 9:00 or 10:00 p.m.

has countenanced the entry of solicitors onto private property in the absence of a "no trespassing" sign. See City of Watseka v. Illinois Public Action Council, ___ U.S. ___, 107 S.Ct. 919, rehearing denied, 107 S.Ct. 1389 (1987), aff'g mem., 796 F.2d 1547 (7th Cir. 1986); Martin v. Struthers, 319 U.S. 141 (1943). In contrast, a lone, silent picketer on the public way might well go unnoticed by a homeowner.

The town cannot constitutionally prohibit other First Amendment activities that may have some impact on neighborhood tranquility. For example, this same group of picketers could march en masse through the Black Forest neighborhood, presumably even "around and around" near the Victoria home. Gregory v. City of Chicago, 394 U.S. at 116 (Black, J., concurring). Groups could go door-to-

door speaking with neighbors and leafletting. Organization for a Better Austin v. Keefe, 402 U.S. 415 at 419. Given these protected activities which the town may not ban, Brookfield's failure to identify that which is "uniquely invasive" about picketing means that its restriction on speech can fare no better than did those at issue in Keefe and Gregory.

If a picketer per se invades the homeowner's privacy, then a homeowner could just as reasonably claim a privacy invasion by any passer-by, whether or not engaged in expression.

This Court has recognized the right of persons to be present on the public streets in the context of vagrancy or loitering statutes. While the statutes at issue were invalidated on due process grounds, the impact of such laws on First

Amendment speech and associational rights was noted. In Kolender v. Lawson, 461 U.S. 352 (1983) the Court struck on vagueness grounds a statute allowing a police officer to demand "credible and reliable" identification of a person who wanders the streets, and to demand that the person "account for his presence." Id. at 357. The Court expressed concern for the statute's "'potential for arbitrarily suppressing First Amendment liberties. . . .' In addition, [the statute] implicates consideration of the constitutional right to freedom of movement." Id. at 358 (citations omitted). See also Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972) (walking and wandering the public streets "are historically part of the amenities of life as we have known them."); Coates v. City of Cincinnati, 402 U.S. 611, 615

association violated by ordinance prohibiting three or more people to "assemble" on the sidewalk and conduct themselves so as to "annoy" passers-by.)

The great variety of activities covered under the "picketing" label shows that picketing per se is not a privacy invasion. For example, friends and neighbors who greet a returning hostage with signs and banners reading "Welcome Home Father Jenco" would likely be warmly received by the homeowner. Yet the greeters would be criminals under Brookfield's ordinance. Similarly, a church youth group could not advertise, by way of holding a banner in front of a member's home, a pancake breakfast or

car-wash.[8] In sum, this ordinance cannot be justified as a privacy protection device. It bans many activities that have no impact on privacy. At the same time, protected activities that it cannot ban have no different effect on neighborhood residents.

D. The Identified Alternatives to Residential Picketing Cannot Justify this Ordinance.

The burden of establishing the existence of adequate alternative channels of communication for these picketers is on the defendants. Cf. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 n.5

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8 If the ordinance does not criminalize the activities in these two hypothetical situations, but does criminalize picketing in front of Dr. Victoria's home, the ordinance cannot be claimed to be content-neutral. Its applicability would depend entirely on the content of the message. Cf. Boos v. Barry, No. 86-803 ("The emotive impact of speech on its audience is not a 'secondary effect'" that can justify a restriction on speech.) Slip op. at 7.

(1984); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76 (1981). At the preliminary injunction hearing, the town failed to come forward with any evidence on this issue. Nevertheless, the picketers did make a showing, sufficient for this preliminary injunction proceeding, that no such channels exist. The affidavit of plaintiff Schultz shows that picketing at the home serves a function that picketing at other locations would not: it conveys the message to the target "and those in his community" and "allows us to reach audiences who might not otherwise receive our messages". (J. A. at 37-38.)

The town suggests two reasons why "ample alternative channels" are available here: the plaintiffs may picket on Brookfield's commercial street, and they may demonstrate or leaflet in the residential areas. (Br. at 41-42.) Neither reason is

sufficient to justify the ban.

Alternative channels of communication must be "ample." Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 93 (1977). They are not ample if the options to which the speaker realistically is relegated "are less likely to reach persons not deliberately seeking [the] information" or are "less effective media for communicating the message that is conveyed" by the proscribed activity. Id. at 93. Thus, for example, in Linmark, this Court found a township ordinance prohibiting the posting of real estate "For Sale" and "Sold" signs violative of the First Amendment in significant measure because the increased difficulty the ordinance added to the

speakers' ability to reach their audience rendered the alternative channels "far from satisfactory." Id.

The often-quoted axiom that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place," Schneider v. State, 308 U.S. at 163, has special meaning in the residential picketing context.

This Court has recognized that there are "many sorts of picketing which must be carried out in residential neighborhoods or not at all. Protests arising out of landlord-tenant relationships, zoning disputes, and historic preservation issues are just some of the many demonstrations that bear a direct relation to residential neighborhoods." Carey v. Brown, 447 U.S. at

468 n.13. Access to the neighbors of ultimate targets of protests such as those identified in Carey may be critical to the success or failure of the protest. This was the case in the anti-slum drive of The Woodlawn Organization ("TWO") in Chicago in the 1960s. Tenants would demand that a slum landlord make the necessary repairs in his buildings to make them habitable. After escalated forms of protest,

> [i]f the landlord remained recalcitrant, groups of pickets were dispatched to march up and down in front of the landlord's own home, carrying placards that read "Your Neighbor Is A Slumlord." The picketing provided a useful outlet for the anger the tenants felt, and gave them an opportunity, for the first time in their lives, to use their color in an affirmative way. For as soon as the Negro pickets appeared in a white suburban block, the landlord was deluged with phonecalls from angry neighbors demanding that he do something to call the pickets off. Within a matter of hours

> landlords who were picketed were on the phone with TWO, agreeing to make repairs.

C. Silberman, Crisis in Black and White 330 (1964).

The TWO picketers would be left with no effective alternative site for their protest if the slumlord whose actions they sought to modify lived in Brookfield. The challenged ordinance would deprive them of the opportunity to communicate with the slumlord's neighbors, negate the effectiveness of their protest, and thus deny them the benefits of the First Amendment.

Picketing in residential neighborhoods has no equivalent, not only for reaching neighbors of a protest target, but also when the residence is the only place where the protesters can confront the source of their

discontent. This is true for some labor picketing, such as that by a maid toward an employer. See, e.g., Carey v. Brown, 447 U.S. at 480-81 (1980) (Rehnquist, J., dissenting)(state anti-residential picketing statute's exemption for picketing related to a labor dispute reflects "legitimate interest" in "providing a forum where no other is reasonably available"). It is also true for many tenant protests. See, e.g., Hibbs v. Neighborhood Organization to Rejuvenate Tenant Housing, 433 Pa. 578, 252 A.2d 622 (1969) (landlord's residence was proper situs for tenant picketing where landlord conducted business so as to avoid detection). Thus, the fact that plaintiffs may picket elsewhere is not an ample alternative.

Because it cannot constitutionally bar marches and leafletting campaigns, the town points to these as a second set of alterna-

ive channels. (See br. at 41.) While these devices may indeed be means by which individuals can spread their message, their availability cannot save this statute even if they are presumed to be adequate. As shown in the preceeding section, the regulation is not narrowly tailored. The existence of ample alternatives is a necessary requirement for a valid time, place and manner regulation, but that fact alone is insufficient to support its constitutionality.

E. The Ordinance Cannot Be Justified By Reference To Labor Picketing Cases.

Amici National League of Cities et al. argue that picketing is subject to stricter governmental regulation than are other forms of protected expression, suggesting that it is inherently coercive and necessarily carries with it a message far different from

the fact of a dispute. (Br. at 18-19.)[9] The cases cited for that propcsition, however, are irrelevant to the peaceful, public-issue picketing in this case.

In NLRB v. Retail Store Employees Union, Local 1001 (Safeco), 447 U.S. 607 (1980), the Court found that the goal of a picket line, as part of a secondary boycott, was illegal. Justice Stevens' concurrence, upon which amici rely, was not speaking of the effect of peaceful, public-issue picketing. To the contrary, Justice Stevens merely observed that "[i]n the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive

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9 Even if picketing per se were somehow more coercive than other speech, or were always aimed at inducing action, that would not justify treating communication by picketing any differently from other speech. See Boos v. Barry, No. 86-803, slip op. at 8 (adverse emotional impact on listener insufficient to justify punishing the speaker).

deterrent to third persons about to enter a business establishment." 447 U.S. 619. (emphasis supplied.) In Bakery and Pastry Drivers Local 802 v. Wohl, 315 U.S. 769 (1942), the Court specifically declined to enjoin a labor-related picket, because it was otherwise impossible to publicize the grievance, and the picket had only a slight effect on parties neutral to the dispute.[10]

The Court in NAACP v. Claiborne Hardware, 458 U.S. 886, rehearing denied, 459 U.S. 898 (1982) declined to extend cases such as Safeco to political picketing.

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10 Amici's remaining authority is Hughes v. Superior Court, 339 U.S. 460 (1950). That decision was based on the fact that the object of the picketing was illegal. The object--hiring of workers in proportion to the racial make-up of the business' clientele--may have been "illegal" in 1950, but it is not now. More importantly, the picketing in that case was virtually identical to the public-issue picketing held to be protected expression in NAACP v. Claiborne Hardware Co., 458 U.S. at 907.

In Claiborne Hardware, a group of blacks organized a broad economic boycott of businesses that violated, through employment and other practices, the civil rights of black residents. The boycott included peaceful picketing, but some acts of violence did occur. The boycotted merchants sought to hold the blacks liable for their economic injury. The Court held the boycotters' "peaceful political activity" protected by the First Amendment in spite of a strong state interest in economic regulation. 458 U.S. at 912-13, distinguishing Safeco. The Court stressed the public issue nature of the boycotters' speech, noting that its goal was to force governmental and social change. Id. at 913-15.

The only similarity between the Brookfield and Claiborne Hardware picketers and the picketers who were enjoined in Safeco is

that they all carry their messages on placards. But it is not the form of speech that provides the analytic underpinning in Safeco. Rather, the Court rested its decision in Safeco on its identification of an illegal purpose and economic power behind the picketing. 447 U.S. at 616.

Much like the leafletters in Keefe and Schneider, the Gregory marchers, and the Claiborne Hardware demonstrators, these plaintiffs seek only to bring their message to their audience. Accordingly, cases where this Court has restricted picket lines because they urge unlawful secondary boycotts are simply not applicable to this political, public-issue picketing.

II. THE ORDINANCE IS VOID FOR VAGUENESS.

The ordinance itself does not define "picketing," and the definition supplied by the town for purposes of this litigation

appears to criminalize a far broader range of expressive behavior than one might ordinarily consider to be included in the term. According to the town, to "picket" means to "stand or patrol". (Br. at 41.) The proffered definition increases the confusing nature of the ordinance, rather than clarifying what conduct it prohibits, for it is at odds with what is traditionally viewed as "picketing."

In order to survive a vagueness challenge, a statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," must "provide explicit standards for those who apply" it so as to prevent arbitrary enforcement, and must not "lead citizens to 'steer far wider of the unlawful zone'. . . than if the boundaries of the forbidden areas were clearly marked." Grayned v. City of

Rockford, 408 U.S. 104, 108-09 (1972) (footnotes and citations omitted). Vagueness is particularly problematic where, as here, the prohibition abuts constitutionally protected rights. Id., 408 U.S. at 109; Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961). Brookfield's ban on residential picketing fails each of the three vagueness standards and is therefore void.

First, the ordinance fails to provide fair notice of what conduct is prohibited, making it difficult for citizens to know how to conform their conduct to the law's requirements. A group engaged in what is traditionally considered "picketing" -- a line of placard-carriers, for example, warning of a labor dispute -- would clearly be covered by the ordinance. But whether a solitary protester wearing an anti-abortion symbol, walking "around and around" near the

mayor's home (see Gregory, 394 U.S. at 116; Black, J., concurring), would be prohibited as "standing or patrolling" is not clear at all. The statute thus does not provide the fair notice necessary to escape a finding of vagueness.

Second, the ordinance vests its enforcers with unbridled discretion to determine what falls within its prohibition and what does not. The vesting of such unbridled discretion cannot be squared with the constitution. Coates v. Cincinnati, 402 U.S. 611, 614 (1971); Shuttlesworth v. Birmingham, 382 U.S. 87, 90 (1965). As is obvious from the supplied definition ("stand or patrol"), a limitless variety of activities could be deemed "picketing" within this ordinance. A resident strolling around the block, perhaps wearing a political button or an armband, may well pass a police officer without being

arrested, as could banner-carrying high school students celebrating a team victory in front of the star player's home. But a group of citizens upset with the mayor's stand on school desegregation, carrying signs or simply marching in a group, may well be charged with "picketing".

Third, the ordinance is so indefinite that it may cause persons to steer clear of engaging in protected expression because of the risk that such expression will be deemed to be prohibited "picketing". The "boundaries of the forbidden areas" are not "clearly marked". Grayned v. City of Rockford, 408 U.S. at 109. It is not possible to tell whether a particular gathering is a permissible march within Gregory v. Chicago, 394 U.S. 111, or a criminal "picket" within the ordinance. Citizens will inevitably forego the exercise of constitutional rights for fear of being

subject to arrest.

This ordinance cannot withstand a vagueness challenge and is therefore void.

III. THE ORDINANCE IS OVERBROAD AND THEREFORE FACIALLY UNCONSTITUTIONAL.

This Court has recognized two kinds of overbreadth. A statute may be "substantially overbroad", constitutional in some of its applications but sweeping too much protected activity within its ban. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). A statute may also regulate so broadly that it is unconstitutional in all its applications. Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 966, 968 (1984). It is this latter form of overbreadth from which the Brookfield ordinance suffers. It absolutely bars all picketing "before or about" residences within the town. It does not purport to regulate, for example, to accommodate

competing uses of the public way.

In City of Houston v. Hill, ___U.S.___, 107 S.Ct. 2502 (1987), this Court held overbroad a statute prohibiting abusing or interrupting a police officer in the course of an investigation. The statute was a "general prohibition of speech that 'simply ha[d] no core' of constitutionally unprotected expression to which it might be limited." 107 S. Ct. at 2513 (citation omitted). Similarly, there is no "core" of unprotected activity to which this ordinance can constitutionally be applied. It is not susceptible to a limiting construction since all of the activity it prohibits is protected.

Accordingly, the ordinance is invalid in all of its applications, and is therefore unconstitutionally overbroad.

CONCLUSION

At this preliminary injunction phase, the picketers need only show that they have a "reasonable likelihood" of success after trial. The district court's conclusion that the ordinance most likely will be shown to be unconstitutional was correct, as was the Seventh Circuit's affirmance of that conclusion.

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